IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1168

FREDERICK N. MCDONALD,
Petitioner

v

WILLIAM P. GERBERDING, President of the University of Washington; DR. BENJAMIN H. BELKNAP, Chairman of the Admissions Committee of the University of Washington School of Medicine; DR. ROBERT L. VAN CITTERS, Dean of the School of Medicine; GORDON C. CULP, J. HANS LEHMANN, ROBERT D. LARABEE, R. MORT FRAYN, MRS. WILLIAM H. GATES, TAUL WATANABE, R. F. PHILIP, the Board of Regents of the University of Washington; W. W. WASHBURN, Registrar of the University of Washington; UNIVERSITY OF WASHINGTON, Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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OPINION BELOW

The unanimous opinion of the Washington State Supreme Court in this matter is reported as *McDonald v. Hogness*, 92 Wn. 2d 431, 598 P.2d 707 (1979). It is reprinted in Appendix A to the Petition for a Writ of Certiorari filed herein.

QUESTIONS PRESENTED

1. Does the denial of an application for admission to a state medical school violate the equal protection clause of the fourteenth amendment or Title VI of the Civil Rights Act of 1964 because race is considered in the admissions process, where

(a) the application was denied without regard to race, and

(b) the application would have been denied even if race was nowhere considered in the admissions process?

2. Is the denial of an application for admission to a state medical school a deprivation of liberty or property within the meaning of the fourteenth amendment?

3. Does the consideration of race as one factor in the overall evaluation of applicants in an admissions program in which all applicants compete against each other violate the fourteenth amendment's equal protection clause, where race is considered in order to obtain a diverse and integrated student body, and meet medical manpower needs of the region served by the school?

STATEMENT OF THE CASE

An accurate and comprehensive statement of the facts of this case is set forth in the Findings of Fact and Conclusions of Law adopted by the trial court, a copy of which is attached as Appendix C to the Petition for a Writ of Certiorari to the Supreme Court of the State of Washington (hereinafter, Petition). Petitioner challenged only Finding of Fact XXII in his unsuccessful appeal to the Washington State Supreme Court. Respondent invites the Court to consult those findings as they are not otherwise in dispute.

Petitioner initiated this litigation in the Superior Court of the State of Washington for King County in order to challenge

the denial of his application for admission to the University of Washington School of Medicine. The court dismissed the action after petitioner presented his case, and was affirmed in a unanimous opinion of the Washington State Supreme Court.

The respondent Board of Regents of the University of Washington operates and maintains the School of Medicine as authorized by the state legislature. Pursuant to Revised Code of Washington (RCW) 28B.20.130(3) the Board of Regents has the general power and duty to "establish entrance requirements for students seeking admission to the University." For Medical School admissions, this responsibility has been delegated to the School of Medicine which established the admissions requirements for the 1976 entering class, the class to which petitioner sought admission.

The admissions process was described by the trial court as "a sophisticated system for interview processing and finally selecting candidates for [the University of Washington's] medical school." Petition, App. F at 5. Generally, there were three levels of applicant review: (1) evaluation of paper credentials alone by the Reading Committee; (2) evaluation of paper credentials and the applicant personally by an Interview-Conference Committee; and (3) review of application files by the Executive Committee of the Committee on Admissions.

The selection factors for admission to the University of Washington School of Medicine in 1976 were set forth in *Medical School Admissions Requirements 1967-77* as follows:

> Candidates are considered comparatively on the basis of academic performance, medical aptitude, motivation, maturity, and demonstrated humanitarian qualities. Extenuating background circumstances are considered as they relate to these selection factors.

Finding of Fact X, Petition, App. C at 11. Academic performance is generally measured in part by Grade Point Average (GPA) and medical aptitude is generally measured in part by the Medical College Aptitude Test (MCAT) score. Motivation maturity, humanitarian qualities, and extenuating background circumstances are evaluated in part through the use of interviews.

In the admission process an applicant's GPA and MCAT scores are converted, weighed, and combined by a calculation formula to arrive at a single score called the First Screen Score. The First Screen Score is later combined with the Interview-Conference Score and the result is called the Total Score. A Skeletal Consideration List is prepared to established a rough order of consideration of candidates by the Executive Committee. That list places applicants in four groups based upon Interview-Conference Scores, and ranks applicants within groups by Total Score.

The Interview-Conference Committee is generally composed of three members of the Committee on Admissions. Each interview-conference averages approximately 20-30 minutes and the committee members present at each such interview-conference have had prior access to and have studied advance copies of the candidate's application files. Findings of Fact X(d) and XX, Petition, App. C at 13-15 and 29. The members of the Interview-Conference Committees were trained and given guidance and direction for the evaluation they were to make in the admissions process. Finding of Fact XXI, Petition, App. C at 29-31. The guidelines were derived from a national task force on admissions, and other national and regional studies. Finding of Fact XIX, Petition, App. C at 27-28.

The admissions program did not treat applicants differently on the basis of race. Finding of Fact XVII, Petition, App. C at 26. The Chairman of the Committee on Admissions and Assistant Dean of the Medical School, Dr. Benjamin H. Belknap, testified that a diverse student body was important to the educational program offered by the School of Medicine. As a result, race was "considered to the extent that every individual's uniqueness is considered." Verbatim Record of Proceedings at 487 (hereinafter V.R.).

There were 175 positions available for the 1976 entering class, of which 50 were allocated to applicants from Montana, Alaska, and Idaho pursuant to agreements with these states and with the approval of the Washington State Legislature. *See* RCW 28B.15.225 and Chapter 28B.70 RCW. One thousand seven hundred and three individuals applied for admission. Finding of Fact VII, Petition, App. C at 6. Five hundred and forty six of those considered potentially competitive by the Reading Committee were considered for review by the Interview-Conference Committees.

Petitioner's application was denied on the basis of the published selection criteria. While the trial court acknowledged that he was an "oustanding student" (Petition. App. F at 1), it placed him "in that group of qualified candidates whose overall credentials were of *average quality* in comparison with those of the many candidates with whom he was in competition for the limited number of positions available." Finding of Fact XVIII, Petition, App. C at 26-27 (emphasis supplied).

Petitioner ranked 204th in the applicant pool on the basis of his First Screen Score (combined GPA and MCAT), and he was among the 546 applicants who were granted interviews.

After the interview-conference, over 300 applicants placed higher than petitioner on the Skeletal Consideration List. Finding of Fact X (g), Petition, App. C at 16-17. The Executive Committee denied petitioner's application, and did not place him on the 18-person alternate list. Even if no minority applicants had been admitted to the School of Medicine in 1976, an unchallenged finding of the trial court shows that petitioner still would not have been admitted. Finding of Fact XVIII, Petition, App. C at 26-27.

ARGUMENT

I.

ON THE FACTS OF THIS CASE, PRELIMINARY ISSUES ARE DISPOSITIVE AND THUS THE CASE DOES NOT PRESENT SIGNIFICANT ISSUES UNDER THE EQUAL PROTECTION OR DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION.

A. *Consideration of race in the Medical School's admissions program was not a "but for" cause of the denial of petitioner's application, and hence the lawfulness or unlawfulness of consideration of race in the program would not be dispositive of petitioner's claim.*

Petitioner's equal protection challenge to the denial of his application for admission to the University of Washington Medical School is premised on the consideration of race in the Medical School's admission process. Petitioner is not entitled to judicial relief, however, if the consideration of race

was not the cause of his "injury."[1] The causation requirement was explained in a case in which plaintiffs challenged a zoning decision by the Village of Arlington Heights on equal protection grounds. The Court there reasoned as follows:

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not ncessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision.

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 270-71 n.21 (1977). Because petitioner would not have been admitted to the Medical School even if no racial minorities had been admitted, he cannot "fairly . . . attribute the injury complained of to improper consideration of a discriminatory purpose" to favor members of minority groups. *See Regents of the University of California v. Bakke*, 438 U.S. 265, 320 (1978) (Powell, J.) (application of "but for" test to medical school admissions case).

Specifically, the trial court in this case found:

> Under the sophisticated selection system used by the medical school [petitioner] would not have been admitted even if all six of the minority applicants [who were admitted] were removed.

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1. The causation requirement is clear insofar as petitioner relies on Title VI of the 1964 Civil Rights Act, 42 U.S.C § 2000d (1976). To make out a claim under that statute, petitioner must establish that his application was denied "on the ground of race." *Id.* If it was denied for other reasons not prohibited by the statute, as was the case here, there is no violation of the statute.

Finding of Fact XVIII, Petition, App. C at 26-27. This finding has never been challenged by petitioner. Thus, even if there had been no consideration of race in the admissions process, and even if, as a result, no minority applicants gained admission, petitioner's application still would have been denied.[2] The Washington State Supreme Court thus held:

> At the outset, we note that the evidence shows McDonald would not have been admitted into the [1976] class even absent the six minority persons accepted and without any consideration of race. This alone is justfication for denying relief on equal protection grounds.

McDonald v. Hogness, 92 Wn. 2d 431, 436, 598 P.2d 707, 711 (1979); Petition, App. A. Since this finding is dispositive, the underlying validity of the consideration of race in the admissions program would not be an issue before the Court.[3]

B. *Petitioner has neither a property nor a liberty interest in a medical education at the University of Washington, and hence the due process clause of the fourteenth amendment is inapplicable to the denial of his application for admission.*

---

2. Petitioner argues that "If favored racial minorities are to receive "plus points" on the interview, so to [sic] should Fred McDonald." Petition at 12. If petitioner had received "plus points," so too would all other nonminority applicants. Petitioner's position in the applicant pool thus would have remained unchanged in relation to nonminority applicants, and his appilcation still would have been denied.

3. The Washington State Supreme Court went on to consider the validity of the use of race in the admissions program "because of the public importance of the issue and the likelihood of its recurrence." 92 Wn. 2d at 436, 598 P.2d at 711. Without more, these factors have never been invoked by the United States Supreme Court to justify issuing an essentially advisory opinion. "The 'federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.'" *DeFunis v. Odegaard*, 416 U.S. 312, 316 (state supreme court decision vacated and remanded as moot), *decision reinstated on remand*, 84 Wn. 2d 617, 529 P.2d 438 (1974) (public importance doctrine).

Petitioner argues that the denial of his application was a denial of procedural due process in violation of the fourteenth amendment. Petition at 10-11, 13. The Court has made clear, however, that the guarantee of procedural due process applies in cases such as this, according to its terms, only to a deprivation of life, liberty, or property. In a medical school dismissal case, the Court stated:

> To be entitled to the procedural protections of the Fourteenth Amendment, respondent must in a case such as this demonstrate that her dismissal from the School deprived her of either a "liberty" or a "property" interest.

Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78, 82 (1978). Here, petitioner has never alleged a property or liberty interest in being admitted to the University of Washington School of Medicine. No state statute, contract, or informal agreement gives petitioner an entitlement to be enrolled in the Medical School, and it hardly can be claimed that the denial of his application infringed a liberty interest protected by the fourteenth amendment. *Cf. Paul v. Davis*, 424 U.S. 693 (1976) (reputation not a protected liberty interest).

II.

THE DECISION OF THE WASHINGTON STATE SUPREME COURT IS CONSISTENT WITH THE DECISION OF THE UNITED STATES SUPREME COURT IN *BAKKE*

Petitioner argues that there is a conflict between the decision of the Washington State Supreme Court in this case and the decision of the Court in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Even if the lawfulness of the consideration of race in the admissions program

was an issue presented here, the unanimous decision by the Washington State Supreme Court was consistent with *Bakke*, and therefore this is not a case in which the Court's supervisory powers need to be exercised to correct an erroneous decision.

There were three principal opinions in *Bakke*. We consider first the opinions of Mr. Justice Powell (announcing the Judgment of the Court) and Mr. Justice Brennan (joined by Justices White, Marshall, and Blackmun). Both opinions held that under certain conditions race may be considered in a state medical school's admissions program, and both opinions endorsed an admissions program such as the one used by Harvard College. The admissions program at the University of Washington School of Medicine is within the constitutional parameters established by the two opinions.

Mr. Justice Powell enunciated the stricter test. He stated that in order to justify the consideration of race in this context, "a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." 438 U.S. at 305 (Powell, J.). One purpose or interest Mr. Justice Powell found to be "permissible and substantial" was the attainment of a diverse student body. Although concluding that "the assignment of a fixed number of places to a minority group is not a necessary means toward that end," he approved a program wherein "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." The "principal evil" of the program involved in *Bakke*, according to Justice Powell, was the denial of "individualized consideration without regard to . . . race."

The admissions program at the University of Washington School of Medicine avoids the principal evil identified by Justice Powell. Although race is considered in the program, there is "no special consideration nor separate treatment [of] Black American, Chicano, and American Indian applicants that were interviewed." Finding of Fact XVII, Petition, App. C at 26 (not challenged by petitioner). Thus the very aspect of the admissions program petitioner asserts to be constitutionally defective, the interview process, is characterized by individualized consideration of applicants without regard to race.

Moreover, one of the goals behind the consideration of race at the University of Washington is to obtain a diverse student body—a goal Justice Powell described as "compelling in the context of a university's admissions program." 438 U.S. at 313 (Powell, J.). Petitioner's claim that the diversity sought by the University of Washington is "racial diversity" and "not what this Court meant" by diversity, Petition at 12, was correctly rejected by the Washington State Supreme Court. "The record . . . refutes the contention Belknap was not referring to diversity in Powell's broad sense, which involves consideration of race in conjunction with other attributes." 92 Wn. 2d at 440-41 n.8, 598 P.2d at 713 n.8; Petition, App. A. In the words of the Chairman of the Admissions Committee, Dr. Belknap, "race is considered to the extent that every individual's uniqueness is considered." V.R. at 487. Thus both as to the goal it pursued and the means by which it did so, the University of Washington acted in a constitutionally permissible manner.

Analysis of Mr. Justice Brennan's opinion leads to the same conclusion. Justice Brennan stated the controlling test as follows:

> Instead, to justify such a classification an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program.

438 U.S. at 361 (Brennan, J.) In seeking to obtain diversity, meet medical manpower needs in the region, and promote racial integration in public education, the University of Washington had an important purpose for the consideration of race in the program. Because the program does not stigmatize any discrete group or individual, and uses race in a reasonable manner in light of the program's objectives, it is within the constitutional parameters articulated by Mr. Justice Brennan.

Mr. Justice Stevens (joined by Chief Justice Burger and Justices Stewart and Rehnquist) did not reach the constitutional issue in *Bakke*. He voted to affirm the judgment of the California Supreme Court, ordering Bakke's admission to medical school, on the basis of section 601 of the Civil Rights Act of 1964. Specifically, he concluded that "[t]he University's special admission program violated Title VI of the Civil Rights Act of 1964 by excluding Bakke from the medical school because of his race." 438 U.S. at 421 (Stevens, J.). Because it was established in this case that petitioner's application was not denied because of his race, there is no conflict between the decision of the Washington State Supreme Court and Mr. Justice Stevens' opinion in *Bakke*.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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